BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	**CC Docket No. 96-98**

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

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June 10, 1999

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Pursuant to Sections 1.415 and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. §§ 1.415, 1.419 (1998), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits the following reply comments supporting certain initial comments filed addressing the FCC's "Second Further Notice of Proposed Rulemaking" ("FNPRM") adopted April 8 and released April 16, 1999 in the above captioned proceeding. Consistent with those comments, NARUC respectfully suggests, *inter alia,* that the FCC should provide "State Commissions and U.S. Territories with flexibility to modify any minimum national list of UNEs defined by the FCC in the interest of the continued development of local competition." See Appendix A.

In support of its comments, NARUC states as follows:

I. DISCUSSION

THE FCC SHOULD CAREFULLY CONSIDER THE COMMENTS FILED BY THEIR STATE COMMISSION COLLEAGUES AND PROVIDE STATES WITH FLEXIBILITY TO MODIFY ANY MINIMUM SET OF UNES ESTABLISHED BY THE FCC.

In a March 1999 Resolution, NARUC urged the FCC to act expeditiously to issue its orders regarding Unbundled Network Elements ("UNEs"), so as to minimize any regulatory uncertainty that could inadvertently delay the development of local competition.

Given the range of issues facing the FCC and the resources available, it is clear the agency has acted in a timely fashion and remains focused on expeditious completion of this docket. NARUC commends the Bureau Staff and the Commissioners for their efforts to date.

That same resolution also urges the FCC, to (1) "at a minimum, readopt, on an interim basis, the UNEs defined in Part 51 of the FCC's rules" and (2) with State input, to first clearly define the standards of 'necessary' and 'impair' in order for States to provide more meaningful comments regarding the final formulation of the UNE list.

The approach the FCC has chosen departs somewhat from the procedure suggested in the NARUC resolution. However, it is clear, that the resolution points to the formulation of a national list *of some kind* with close attention suggested for State views on any final FCC proposed order. In addition, the final "resolved" of the resolution urges the FCC to make sure its final rules "*provide State commissions with flexibility to modify the minimum set of UNEs as defined by the FCC.*"

An examination of a number of the State commission comments filed in this proceeding clarifies the basis for these positions. Those comments point out that the States have been heavily involved in arbitrations since shortly after the Act passed. The focus of those arbitrations in most instances has been what UNEs must be provided, at what cost, and under what conditions. The *Iowa* decision suggests that the Act requires fact-based determinations specific to a market - *the precise type of procedure States have been engaged in for almost three years* - – to determine what UNEs and incumbent LEC must supply. In these circumstances, the comments and experience of State regulators, who, like their federal counterparts, are sworn to uphold the public interest, and play a unique role under the scheme established by Congress, are particularly worthy of close examination and deference.

Accordingly, NARUC generally supports the State comments filed in this proceeding to the extent that they seek (1) some type of national list – rebuttable or otherwise, and (2) State flexibility to modify the list based on application of the FCC's standards to State-specific information [1]

It is clear the Act's language supports both these positions. Section 251(d)(2) suggests that some type of minimum list should be made available for purposes of § 251(c)(3). In ¶ 14 of the FNPRM, the FCC acknowledges its original determinations that the statute allows States to impose additional unbundling requirements. Section 251(d)(3) provides any needed authority for States to apply FCC standards to "modify" the list[2] and the structure of Title II suggests that any "national list" can be varied with State-specific information so long as the additions and/or deletions are consistent with interpretations of §§ 251(d)(2)(A) and (B) standards.

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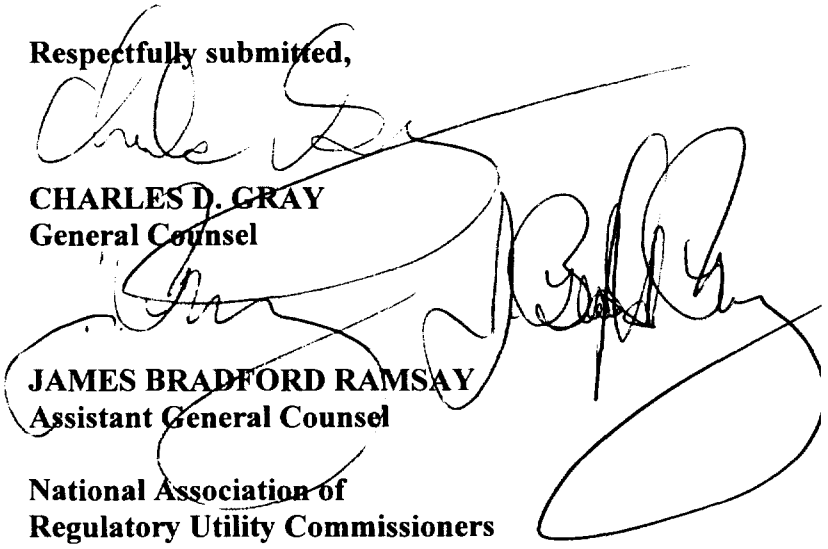
[1] See, e.g., the May 26, 1999 filed (1) "Comments of the Public Utilities Commission of Ohio", Part A, ¶ 2, where the PUCO says "the FCC should establish a flexible set of UNEs..The fact that a particular UNE is on the FCC's list really means that there is a presumption that it generally meets the "necessary" and "impair" standards, which presumption can be rebutted where a proper showing is made [to a State commission]," (2) "Comments of the People of the State of California and the California Public Utilities Commission," at pages 3-7 "The FCC Should identify a List of Network Elements that Would be Available on a National Basis," and at pages 7-14, "The FCC should allow the States to add UNEs or to subtract UNEs previously added.", (3) "Comments of the Illinois Commerce Commission", at 2, where the ICC says both that the FCC should identify a minimum set of UNEs that must be unbundled on a national basis and that States should have the flexibility to add to that minimum list, (4) May 25, 1999 Letter from the Oregon PUC Commissioners, which suggests that the FCC's authority to implement the local competition rules under Section 201(b), gives it the authority to delegate States the authority to adopt additional UNES, (5) "Comments of the Public Utility Commission of Texas", at 3-9 arguing that "the FCC should establish the starting point for unbundling elements with a presumptive national list, coupled with guidelines addressing how those elements would be added to...the list. State regulators would then be allowed to apply those guidelines to the specific market circumstances in their region."

[2] The *First Report and Order* relied on § 252(e)(3) as authority for the States to expand the list. However, a better source for State authority is found in § 251(d)(3). That section specifically states that "in prescribing and enforcing regulations. . ., the [FCC} shall not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and interconnections obligations of [LECs]; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part." Subsection 251(d)(3) grants States the authority to add or delete unbundled network elements from the FCC's list, so long as the "interpretation" under § 251(d)(2)(A) and (B) is met.

III. CONCLUSION

NARUC generally supports the State comments filed in this proceeding to the extent that they seek (1) some type of national list – rebuttable or otherwise, and (2) State flexibility to modify the list based on application of the FCC's standards to State-specific information. We respectfully request that (1) the FCC closely examine and give deference to the comments filed by our State commission members - who, like their FCC counterparts, are sworn to uphold the public interest, and have gained a special expertise on these issues as a result of the unique role they play under the Congressional scheme to implement the Act, and (2) as noted in our initial comments, the FCC reduce the opportunities for forum shopping and unnecessary litigation by not proposing any new mechanisms for review of State UNE decisions.

Respectfully submitted,



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Appendix A - Resolution Regarding Unbundled Network Elements

WHEREAS, The FCC's Interconnection Order (CC 98-96), defined the minimum set of unbundled network elements (UNEs) that incumbent local exchange carriers (ILECs) must make available to competitive local exchange carriers (CLECs) under Section 251(c)(3) of the Telecommunications Act of 1996 (the Act); and

WHEREAS, The U.S. Supreme Court recently issued its opinion directing the FCC " to determine on a rational basis which network elements must be made available, taking into the account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirement;" and

WHEREAS, While the Supreme Court faulted the FCC's premise in evaluating UNEs, it did not fault any of the specific UNEs defined in Section 51.319 of the FCC's rules; and

WHEREAS, Consistent with the intent of the Act, State Commissions and U.S. Territories and U.S. Territories have ruled, in generic proceedings and in decisions on interconnection agreement arbitrations, those network elements which ILECs must make available to CLECs; and

WHEREAS, Based on FCC and State decisions regarding local competition, including UNEs, local exchange competition is developing; and

WHEREAS, The FCC has often cited the benefit of having State Commissions and U.S. Territories serve as laboratories to facilitate local competition through the adoption of innovative local competition policies; therefore be it

RESOLVED, That the National Association of Regulatory Utility Commissioners (NARUC), assembled at its 1999 Winter Meetings in Washington D.C., urges the FCC should act expeditiously to issue its orders regarding UNEs, so as to minimize any regulatory uncertainty that may inadvertently delay the development of local competition; and be it further

RESOLVED, The NARUC urges the FCC, with State input, to first clearly define the standards of 'necessary' and 'impair' in order for States to provide more meaningful comments regarding the formulation of the UNE list, and be it further

RESOLVED, Urges the FCC, at a minimum, readopt, on an interim basis, the UNEs defined in Part 51 of the FCC's rules; and be it further

RESOLVED, That the FCC's new UNE rules should provide State Commissions and U.S. Territories with flexibility to modify the minimum set of UNEs as defined by the FCC in the interest of the continued development of local competition; and be it further

RESOLVED, That the NARUC General Counsel be directed to file comments with the FCC conveying these NARUC positions.

Sponsored by the Committee on Telecommunications
Adopted February 24, 1999